

No. 13,678

United States Court of Appeals
For the Ninth Circuit

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| ARNOLD SWARTZ and MAX GOODMAN, <i>Appellants,</i> |
| vs. |
| UNITED STATES OF AMERICA, <i>Appellee.</i> |

APPELLANTS' OPENING BRIEF.

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FILED

JUN 17 1953

PAUL P. O'BRIEN
CLERK

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APPELLANTS' OPENING BRIEF.

Appellants were tried and convicted on the second count of an indictment filed in the United States District Court for the Territory of Hawaii, which count of the indictment charged the appellants with violating Sec. 641 of Title 18 of the United States Code, said count reading as follows (R. 3-4):

“That between the 8th day of September, 1950 and the 28th day of December, 1950, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Arnold Swartz, the identical person named in Count I of this indictment, and Max Goodman, did knowingly, wilfully, unlawfully and feloniously conceal, with intent to convert to their use and gain, things of value of the United States, to-wit, 59 zinc ingots belonging to the United States Navy,

weighing 3,311 pounds and having a value in excess of \$100.00, the said Arnold Swartz and Max Goodman then and there knowing the said zinc to have been embezzled, stolen, purloined and converted, in violation of Section 641, Title 18, United States Code.”

At the conclusion of all the evidence in the case each appellant made a motion for a judgment of acquittal, which motions were denied by the Court (R. 468, 489).

The Court sentenced appellant Goodman to imprisonment for a year and a day and to pay a fine of \$2,000 (R. 502), and sentenced appellant Swartz to pay a fine of \$1,000 (R. 502).

From the foregoing judgments and sentences each appellant prosecutes this appeal.

JURISDICTIONAL STATEMENTS.

(1) Jurisdiction of the District Court.

18 U.S.C. sec. 3231, provides that “The district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States.”

(2) Jurisdiction of this Court upon appeal to review the judgment.

28 U.S.C. sec. 1291, reads:

“The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where

a direct review may be had in the Supreme Court.”

28 U.S.C. sec. 1294, reads in part:

“Appeals from reviewable decisions of the district and territorial courts shall be taken to the court of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit embracing the district;
* * *”

28 U.S.C. sec. 41, provides that the District Court for the Territory of Hawaii shall be within the Ninth Judicial Circuit.

(3) **The pleadings necessary to show the existence of jurisdiction.**

(a) The indictment (R. 3).

(b) Pleas of “Not Guilty” (R. 5).

(4) **Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction on appeal to review the judgments in question.**

These facts are set forth in the introductory sentences to this brief and will be stated more fully in the following abstract of the case.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The substance of the indictment has already been set forth in the opening paragraphs of this brief.

The question raised herein is as to the sufficiency of the evidence to support the conviction of each of

the appellants. This matter was raised on the motion for judgment of acquittal made at the conclusion of all the evidence in the case as above set forth.

The testimony introduced at the trial is correctly summarized as follows:

Witnesses for the Government.

Morrow M. Spidell, called by the Government, testified as follows:

(Direct examination). I am a Lieutenant Commander in the United States Navy and hold the position of assistant to the Base Operations Officer for surface craft and target repair at Pearl Harbor and have been such since the month of May, 1950. As such I had certain materials under my control that were used there. There would be zinc there that came under my control but I do not know how much. During the inspection I had to go through before I took over, there were piles of zinc in different places, both at the base craft and the target repair (R. 46-7). The zinc at the target repair was in the lean-to shed directly in back of the target repair building within the Pearl Harbor area, which area was fenced (R. 48). The picture you show me is the lean-to directly in back of the target repair building and is where the zinc was stored. The matter that appears to be piled up in the middle of the area was there in September of 1950 and to a great extent it is still there. There might be one or two, maybe four or five pigs gone since that time but I would say it is almost the same as it was then (R. 49). The zinc is used to make metallic splices when the targets are repaired. We

do not use much of the zinc; it takes just a few ounces at a time to effect a repair. Some time after May, 1950 I received a telephone call and went down and looked at that area and where there had been more than two piles that were there when I got down to the place, there was one entire grating where the zinc had been removed. We didn't count the number of slabs. We do know that there was approximately 2 piles that had been taken from the area between the time when I first looked at it and the time it was called to my attention. I don't know the date it was called to my attention and I went down and checked; it was a few months after I took over (R. 50). I believe that everything that is down there insofar as it is behind the fence and in a restricted area, is Government property unless it is otherwise identified (R. 51).

This zinc was not on any inventory (R. 52).

(The photograph identified by the witness was admitted in evidence as Plaintiff's Exhibit "A".)

Most of the zinc stored in the lean-to was marked "Missouri" (R. 55). The slab of zinc Mr. Albrecht is holding in his hand has the word "Missouri" stamped on it. I cannot identify that slab of zinc as having been a part of the Navy storage but all the slabs of zinc down there are marked "Missouri"; that would be my only identification (R. 56).

(Cross-examination). When I took over I signed a property accountability receipt which constituted the inventory of the property I took over. I didn't sign for any zinc because in that particular area there

is zinc, steel shapes, billets, anchor chain, things that have been left over by ships that wanted to get rid of them that were going out of commission; things that were not required on the ships. They wanted to get rid of them and asked permission to dump them in that particular area. They were given permission to put it there solely because at some time or other we might have been able to use it. We didn't care whether we had it or not because we were already overstocked with material (R. 61-2). There would be no accountability for the zinc in question. It was never thought that any of that stuff would be taken up on inventory. It was dumped and it might lay there for years. As it was in a Navy Base it comes under the jurisdiction of the Navy (R. 62-3).

Calvin C. Tate called by the Government testified as follows:

(Direct examination). I am a Boatswain's Mate in the Navy assigned to Pearl Harbor (R. 64). In September of 1950 I was in charge of the target repair and target upkeep under Commander Spidell. At that time zinc was stored on the premises where I worked. Government's Exhibit "A" is a photograph showing a building that was on the premises in which I was working. In September of 1950 zinc ingots were stored in that building (R. 65). When I first saw that zinc, there were four stacks there originally. Around the first of September, 1950 I noticed that some of them were gone. There were only two stacks there. I used that zinc occasionally, about half of an ingot a month. Some months I didn't use any (R. 66).

Cross-examination). It was about the first of August that I observed four piles of zinc and around the first of September that I noticed there were only two piles (R. 70). In the course of my service in handling zinc I do not recall noticing other marks than the mark "Missouri". I don't know what was the significance of the word "Missouri" on those bars. I know it was on some of them. The word had no significance to me (R. 71).

Elden L. Brown, called by the Government, testified as follows:

(Direct examination). In August of 1950 I was a Private in the United States Marine Corps and in August of that year I went AWOL for 19 days (R. 74). From August 5th. I pleaded guilty at a court marshal hearing to theft of Government property and received a sentence of three and a half years cut to eighteen months. After that I was discharged. We stole some zinc ingots (R. 75). There were two charges of theft of Government property on two occasions. Walter Blanton, Dixie Lawler, Joseph Ludwig and myself stole the property from Bishop Point, Building 13, inside of Pearl Harbor (R. 76). Joseph Ludwig had a Navy Base sticker on his car and we used his car. The building on Government Exhibit "A" is the building where we stole the zinc. We went there about four times to take this zinc away (R. 77). There were two more piles about the same size which you have on the picture there. We took the other two piles (R. 78). We sold most of it down to the Honolulu Supply Co. I didn't go with the other boys every time that any was sold at the Honolulu

Supply Co. I went down there about four times. At the Honolulu Supply Co. I believe I dealt with Mr. Swartz. I don't believe I would recognize him (R. 79).

(Here the witness identifies the defendant Swartz.)

I believe that once Mr. Swartz asked me where I got the zinc and I told him I got it out at Pearl Harbor. He said it looked funny coming in ingots like that, so he marked on the ticket "brass". I remember that. Whenever we sold zinc or anything there he would make out a ticket and sign it. The blue ticket you show me contains my signature. When I went down there I took the zinc along and unloaded it. He made out a ticket and paid me. That is one of the tickets he made out and shows some marks there at the top or something that is scratched out (R. 81). I think that is where he started putting zinc on there and he marked it out and put "brass". It was zinc, not brass. The part that is scratched out was done by Mr. Swartz, the fellow that sold me the brass (R. 82).

(Here the Government offered in evidence a blue paper or ticket which bore the date 6/18/50. R. 83.)

I went AWOL on August 5th for nineteen days. It was during that period of time between August 5th and the time I was picked up nineteen days later that I stole this zinc. I never stole anything at any other time; that was the only period of time that I sold anything to Mr. Goodman and Mr. Swartz—the Honolulu Supply Co. (R. 83). I got that blue ticketed from the Honolulu Supply Co. on August 18, 1950 (R. 84).

When I got that ticket on August 18, 1950 I threw it away (R. 85). The original ticket was given to me. I didn't notice whether a carbon copy was made of the original at the time (R. 86).

(The blue ticket was admitted as plaintiff's Exhibit "C" and is set forth in the record at p. 90; and reads in full as follows: "A6780 6/18/50 Brass...34.80 /s/ E. L. Brown".)

(Cross-examination). When I went AWOL I went in civilian clothes. Without my uniform I could return to the Base as I had a pass in my pocket. After August 5th I'd say I was at the Pearl Harbor Navy Base maybe six times (R. 93). I was always in civilian clothes. I drove another guy's vehicle in there. I went a couple of times to get a load of zinc (R. 94). I went in the car of Joseph Ludwig. After we got the zinc we sometimes took it down to the Airways Hotel and put it in Blanton's truck. Other times I took some out on the dump and hid it overnight and the next morning took it down to the Honolulu Supply Company and sold it (R. 95). I had about 16 ingots on August 17th. On the two times I took the zinc to the Honolulu Supply Company I dealt with Mr. Swartz; that was twice on the morning of the 18th. The first time Swartz asked me where I got the zinc. I told him I got it down at Pearl Harbor. We took the zinc out of the car. I sold it and he said he marked on the ticket "brass" because it would look funny coming in on zinc ingots like that. He paid me and I left (R. 96). I was alone on this occasion. It was about eight o'clock in the morning. I returned thirty minutes

later the same morning, sold the zinc to the same fellow, got a ticket for it and threw the ticket away (R. 97). I unloaded the zinc on the scales which is about 25 feet from the office. Mr. Swartz operated the scales (R. 98). There was no one else present. The first load of zinc weighed around 1200 pounds (R. 99). I think I got 6¢ a pound for it which would be \$72 but the ticket I was given indicates \$34.80 (R. 100). A half hour later I went back and sold another lot at 6¢ a pound. I don't remember what price I got for it. It was right close to \$100 for the two lots (R. 101). Bobbie is a fellow I met with Mr. Blanton one morning. I never saw him again (R. 101). I was present with him when he delivered some zinc about August 16th. No, I take it back, that morning that he went down with us all we had brass and copper; we had no zinc that morning. I never was with Bobbie when any zinc was delivered to the Honolulu Supply Company. It could have been on August 17th (R. 102). On the second trip to the Honolulu Supply Company I had about 16 or 18 ingots of zinc (R. 103). After the zinc was weighed out Mr. Swartz and I walked into the office. He already had marked something down on the ticket. I don't remember what it was (R. 105).

In the statement I made to Mr. Albrecht on November 10, 1950, I said: "Swartz made out a ticket for this metal and wrote 'zinc' on the ticket" (R. 108). Right Now I don't recall what he wrote on the ticket; that was two years ago. Referring to Exhibit "C", approximately two months after the transaction took

place I said that Swartz wrote "zinc" on the ticket (R. 109).

After I was picked up, the first disclosure I made as to what I had done with the zinc was to Mr. Albrecht on November 10th (R. 112). At that time Mr. Albrecht had a large number of blue slips similar to Exhibit "C". He showed me the one numbered A-6831 which bears what purports to be a signature but which is not my signature. He showed me that slip (R. 112).

When I took the zinc to the Honolulu Supply Company, it was in a 41 Ford coupe that was owned by a man named Ludwig (R. 143).

I was the first customer that morning and my first transaction is evidenced by Exhibit "C" in evidence (R. 151). I had stolen some copper and brass prior to these dates from Fort Barrett. On August 14th in the statement I made to Mr. Albrecht it is true that I said that we got \$108 and some cents for this material; that Mr. Albrecht showed me a blue paper number A-6744 dated August 16, 1950 showing 362 pounds of copper at \$50.65 and 580 pounds of brass at \$58 signed Bobbie (R. 152). Mr. Blanton done all the transactions that morning and I was with him. I didn't see with whom Mr. Blanton dealt (R. 153).

(Redirect examination). I sold stuff to the Honolulu Supply Company on two occasions and was there three times with other people when stolen property was sold there (R. 156). The copper and brass that I got at Fort Barrett was sold to the Honolulu Supply Company (R. 156).

Vincent Richard Lawlor testified for the Government in substance as follows:

I am in the general auto repair work and know Elden Brown. I met him in May or June, 1950 and he was then in the U.S. Marine Corps. I knew that he went AWOL early in 1950. During that time I was with him almost every day. I have pleaded guilty in this Court to theft of Government property (R. 160). I stole zinc blocks from the Navy Yard at Pearl Harbor. In the picture, Government Exhibit "B", that is the type of blocks that I stole (R. 161). I went out there four times on three occasions with Joseph Ludwig, Walter Blanton and Elden Brown and on one occasion with Elden Brown. I went two or three times with these boys when the zinc was sold to the Honolulu Supply Company. It was when Brown was AWOL (R. 162). I know Arnold Swartz. I dealt with Mr. Swartz at the Honolulu Supply Company. I went down there once by myself, once with Brown and once with Blanton and Brown. I never had any conversation with Mr. Swartz concerning this thing (R. 163). When I brought the load down myself I never received a ticket for it and I never signed a ticket. He asked me where I got the zinc and I told him "Out at a dump some place." That was about all that was said about it. This was in August (R. 164-5). The time I went down with Brown I dealt with Mr. Goodman. There was nothing said then about the zinc, he didn't ask me where I got it and he made out a ticket. He paid Walter Blanton the money (R. 166).

(Cross-examination). When I said I went there alone, my wife and little boy were with me (R. 168). A few days before that I went there with Brown; it was early in the morning (R. 169). When we went by the place the first time it was closed. We drove down and parked, talked for a while and we came back and it was open (R. 170). Brown went in and talked to somebody in the office and then I think Swartz came out and looked it over. We loaded it on the scale and Brown walked in the office and there was another fellow there. I believe it was an employee of the firm who wrote out a ticket or something on a piece of paper and Brown came out with the money and that's all I had to do with it (R. 171). On the occasion when Brown and I went to the Honolulu Supply Company, we didn't have anything besides zinc (R. 179). On other occasions I had some copper wire sometimes and some lead coating and we had some brass one time too. We took that to the Honolulu Supply Company and sold it (R. 180).

(Here the witness wrote the word Bobbie, his name, and the date on a piece of paper which was received in evidence as Defendants' Exhibit 1 [R. 182].)

When Brown came out of the office with the sales slip he divided what he got with me. I think I received \$15 and Brown told me that he had received probably \$34.80 (R. 184). Walter Blanton was a scrap dealer. I never saw his license (R. 187).

Mack Cottler, called by the Government, testified in substance as follows:

I am a scrap metal dealer. I live in Los Angeles; the name of my company is California By-Products Corporation. I know Max Goodman and Arnold Swartz and have had business dealings with the Honolulu Supply Company during the past three years. I have had many dealings with them (R. 115). According to my records I have the original invoice from the Honolulu Supply Company bearing their number 1954 dated September 22, 1950. This shows 23 drums, approximately 9742 pounds sheet and cast aluminum; 5 pieces of 2450 pounds of sheet and cast aluminum and 2 pieces of 390 pounds, prices to be determined; 4 drums of brass valves and 1 drum Leo Lewis (R. 116). A few days later that bill of lading arrived. It came about the same time. The bill of lading discloses 28 drums scrap aluminum, 7 pieces scrap aluminum (R. 117). I looked at this particular shipment after it was sorted in the warehouse. It was called to my attention by my warehouse foreman that in sorting the aluminum, he found 3305 pounds of zinc, that would be contained in approximately 2 drums. I saw the zinc after it was sorted from the aluminum. A few days after the shipment I mentioned to Mr. Goodman that when we had sorted the aluminum, that we found some zinc in the material and he said "If you have found anything that didn't belong in the aluminum, just hold it" (R. 118). After the final report comes in from the warehouse we make up a payment sheet which we mail to the customer with the amount of the weights, the various commodities, the price, the total plus their check. We did that in this case. The

document you show me is an exact duplicate of that final payment sheet. It discloses that we paid him for his aluminum and we held, subject to what he told us, the zinc and the brass that he sent to us (R. 119). When I went out to look at it the zinc was in 2 drums. When they dumped these drums out I don't know whether the zinc was in separate containers or whether it was mixed with aluminum (R. 120).

Briquetted aluminum in that form would weigh approximately as high as 30 pounds; a piece of zinc in the form of a small slab would probably weigh, depending upon size, about 40 pounds. A drum of aluminum compared to a drum of zinc, there would be a difference of approximately $2\frac{1}{2}$ times the weight, the zinc is heavier (R. 121). According to my records we received 21 drums of aluminum, a total of 9030 pounds tare weight. The drums weighed 903 pounds and the net aluminum was 5197 pounds (R. 123).

(The Honolulu Supply Company's invoice number 1954 was introduced as Plaintiff's Exhibit "D", the Bill of Lading as Plaintiffs' Exhibit "E", and the so-called Final Payment Slip as Plaintiffs' Exhibit "F". The documents are set forth in full in the record at pp. 126, 127 and 128.)

(There was then introduced in evidence as Plaintiffs' Exhibit "H" a letter dated January 18, 1951 from the Honolulu Supply Company to the California By-Products Corporation. The same is set forth in full in the record at p. 132. There was then introduced in evidence as Plaintiff's Exhibit "G" a letter dated January 24, 1951 sent by the witness Mack Cottler

to the Honolulu Supply Company. This letter is set forth in full in the record at p. 131.)

(Cross-examination). The Honolulu Supply Company is shipping to my firm continually. On many occasions they have shipped to us without our ordering. In Mr. Goodman's letter of January 18th, United States Exhibit "H", where he writes with reference to our letter of January 9th in which we sent back your returns for checking purposes, I could not tell whether or not those returns relate to the shipment of aluminum or some other shipment (R. 137).

When my foreman told me that he saw some zinc in the aluminum that he was sorting, I told him if he finds any to just put it aside. He finally called me and showed me 2 drums of zinc. Prior to that time I hadn't seen the zinc at all (R. 138). I can't tell you whether or not the markings on the drums which contained zinc were the same as those on the drums which contained aluminum (R. 139).

I was at no time advised by Mr. Goodman to dispose of this metal for him (R. 141).

Kenneth L. Stone, called by the Government, testified in substance as follows:

I am a scrap metal dealer located in Honolulu. With reference to the comparative weight of a drum of aluminum and a drum of zinc, if you pack the material in the same way and if it would be the same size and shape, I would say that the zinc would be about three times as heavy (R. 192).

Harry L. Albrecht, called by the Government, testified in substance as follows:

I am a Special Agent of the FBI (R. 199). On September 7, 1950 I learned that some zinc had been stolen from the Pearl Harbor Navy Yard. On September 8, 1950 I went to the Honolulu Supply Company and saw Mr. Swartz and Mr. Goodman (R. 201). I told them that there had been a theft of some zinc from the Pearl Harbor Navy Yard and asked whether they had purchased any zinc. I described it as zinc in ingot form. They said they couldn't recall buying any recently and I asked if they would mind if I would check through their records, and Mr. Goodman told me that would be all right. I made notations from certain of these duplicate copies of blue slips which he had in his office and asked if I might borrow certain ones. Mr. Goodman said he would like to talk to his attorney before giving me any tickets and he tried to call Mr. Cobb that day and Mr. Cobb wasn't in (R. 202). I happened to look out the door and I saw 2 ingots of zinc lying on the ground which appeared to be the same as the ones I was looking for and I asked if they had any quantity of them. Mr. Goodman couldn't recall having purchased any himself. Mr. Swartz told me he recalled purchasing it once and gave me the approximate date. He described the seller as a person who had come in a blue Ford coupe and had his wife with him. He said the wife was either a Filipino or Korean (R. 203). Mr. Goodman allowed me to look through his tickets for the month of August. The 2 pieces of metal I saw had the word "Missouri" stamped on them (R. 204). I asked Mr. Goodman to hold the two pieces of zinc. He said he didn't know where the zinc was in the yard; that he

had hundreds of drums of various kinds of metal and he didn't know where that was located at that time. Later I called Mr. Cobb and explained the circumstances to him and on September 18th I went back to Mr. Goodman's place (R. 205).

On the 18th I asked for these sales tickets and he gave me the tickets; I gave him a receipt for them. The eleven blue sheets you hand me are the tickets that Mr. Goodman gave me. There is a serial number at the top of each one (R. 206). As I understand the procedure, these slips are made out to the various people selling the material. They are in a pad form, a white and a blue one, with a carbon between them. On the top ticket they mark out the material, the date and the person who signed it is supposed to get the white copy. The blue copy is then filed. At the time I was in Mr. Goodman's office, it was filed in one of these folders. I examined or looked over all the tickets in either one or two of such folders covering the month of August and these are the tickets which I removed. They are filed in numerical sequence and the dates generally following the dates in numerical sequence (R. 207). Exhibit "C", Ticket A-6780 contained the signature of E. L. Brown. Although this ticket was filed in the sequence of other tickets, yet the date was out of sequence. The number 6780 was in the sequence which would place it in there in August 18, 1950 instead of June 18, 1950 as shown on the ticket (R. 207). Ticket A-6811 refers to 532 pounds of zinc. Ticket A-6766 refers to 1230 pounds of zinc and is signed Bobbie. There were various tickets signed Bobbie (R. 208).

(The eleven blue slips were then introduced in evidence as Plaintiff's Exhibits I-1 to I-11 and are set forth in full in the record at pp. 210-213.)

On my first visit of September 8, 1950 Mr. Goodman said he had made a shipment of zinc. He checked his files and his files showed that shipment as of August 7th and by reference to these tickets he hadn't purchased this particular zinc until after August 7th (R. 214).

The first time I went to see Mr. Goodman he said he didn't want to turn over the zinc to me at that time, that if I would bring the men who stole it to his place and they would say that they had taken it from Pearl Harbor, then he would gladly return it to the Government. On October 31st I told him that I was ready to bring the people down there who had stolen the zinc and he said it wouldn't be necessary and he and Mr. Swartz took me out and opened about 10 drums and we looked into them and there was no zinc in the shape in which the original ingots were and at that time Mr. Goodman said he had a robbery there and that probably somebody had stolen them; he didn't know where they were. He said he had reported that matter to the police (R. 216). Mr. Goodman said he hadn't shipped any zinc out from the time I first talked to him.

On January 18, 1951 I received a call from Mr. Cobb, Mr. Goodman's attorney. Mr. Cobb said that this zinc I had been interested in had been found back on the west coast and that Mr. Goodman would be very glad to tell me about it. In the meantime our

office had located this zinc in December at the California By-Products Corporation in Los Angeles, California (R. 217).

On January 19th I went down to see Mr. Goodman and he permitted me to look over his entire file and to look at the correspondence in his file for 1951 which consisted only of two letters. He said they pertained to the zinc and he gave me copies (R. 218).

(These letters are Plaintiff's Exhibits "G" and "H".)

I talked to Mr. Goodman about the statement in his letter to the California By-Products Corporation dated January 18, 1951 in which it is stated "We think we have also returned by mistake your last letter. In that case please send it back to us, or, if not, send us a copy." Mr. Goodman said that was the letter in which the California By-Products Corporation notified him of the zinc being in their place (R. 228). We never succeeded in locating a copy of that letter.

In January of 1952 I went to the Honolulu Supply Company (R. 229). I asked him if I might see the files on the California By-Products Corporation. At first I talked to Mr. Swartz. He tried to locate the files and could not. He located the '49 file and the '51 file but couldn't locate the 1950 file (R. 230).

(Cross-examination). The blue ticket, Government's Exhibit I-5 numbered 6770, I took because it was within the period I was checking. The signature on there I could not identify and I thought that by talking to some of the other people who had sold ma-

terial there it might throw a little light whether that was their signature or not. I had no other reason for taking that particular ticket. The same is true of the ticket, Government's Exhibit I-3 numbered A-6747 (R. 233). As I went through the blue tickets they were numerically in order. They followed in numbered sequence. I cannot recall whether I paid any attention to whether any tickets were missing. I was told that was all of the tickets. I didn't check through to see if each numerical number was in its place. They were on a loose spindle (R. 234). I was given the tickets voluntarily and checked through them as I pleased (R. 235). I don't want the Court or Jury to understand that I was not accorded every courtesy in the course of my investigation (R. 236).

It was on October 31, 1950 that the 10 drums were opened for my inspection. When I first saw Mr. Goodman I told him there was a quantity of zinc which had been stolen. I asked him if I might look for it in his yard. He said he didn't know where it was in the yard but after checking his records and finding he hadn't sold any zinc between the 7th of August, he presumed the zinc was in his yard and said it was there and it would be safe. When I went there on August 31, 1950 he said it wasn't necessary to bring down those fellows who had taken this zinc and identify it. He said "You can have the zinc." We went out to the yard to look for it. Mr. Swartz had a couple of his men open some drums which were labelled with zinc symbol which he said was all the zinc he had in

the yard at that time. They opened all of those drums and there was no lead. Swartz and Goodman selected the drums to be opened and said they were all the drums of zinc they had in the yard (R. 236-7). I observed a great number of drums apparently prepared for shipment on palettes there. Mr. Goodman said there was a great majority of the drums that had a lot of battery lead in them and other things and there was quite a quantity of those piled, I believe 4 drums high and over quite an area (R. 238).

Mr. Goodman said there had been a robbery at the place which was reported to the Police Department and that this stuff probably was taken out then (R. 238).

(There was then introduced in evidence as Defendants' Exhibits 2A, B, C, D, E and F, a series of photographs to illustrate the yard of the Honolulu Supply Co.; R. 240.)

Mr. Goodman said that the letter of January 18, 1951, Government's Exhibit 8, was the letter in which he was notified that the zinc had been found; he didn't say that was the first information he had to that effect (R. 245).

These slabs of zinc that have been brought in I identify as the original ones which I took from the Honolulu Supply Company on one of my visits there (R. 250). I will say the slabs are zinc, 98% pure, but I don't know that of my own knowledge. I never saw the shipment of zinc that was received at Los Angeles (R. 252).

(The Government having concluded its case. defendants moved for a judgment of acquittal (R. 264), which motion the Court took under advisement.)

The following stipulation was then entered into between the parties: That Mr. Swartz was an employee of the Honolulu Supply Company and had no proprietary interest therein; that the Honolulu Supply Company is a sole proprietorship owned by the defendant Goodman (R. 265-6).

Witnesses for the defense.

Arnold Swartz testified in his own behalf in substance as follows:

I am 32 years old, a scrap dealer, employed by the Honolulu Supply Company (R. 269). Mr. Goodman is my stepfather (R. 270). I have had five years experience identifying and dealing in various types of non-ferrous metals. I generally can grade red metals and I have a fair knowledge of white metals. Red metals are all copper bearing metals; white metals do not contain copper. Red metals generally speaking are copper and brass; white metals are aluminum, zinc, etc. (R. 271).

I first became acquainted with the people whose names have been mentioned in evidence here as having stolen zinc from the Pearl Harbor Navy Yard in July or August of 1950. I first met Mr. Blanton who came into our Yard one day and represented himself as a dealer. He drove the average truck that the average junk dealer in Honolulu would drive. He had some scrap pig on his truck and we explained to him that

we didn't buy scrap iron. Shortly after that he came in one day with his truck and made a purchase of copper or brass (R. 272).

Several days or weeks later he came in again with the two boys that were on the stand yesterday—Brown and Lawlor. I dealt with Blanton (R. 273). I don't remember when I next saw any of that group; they were in from time to time. I remember making out sales tickets once or twice for them. I remember distinctly seeing the fellow I know as Bobbie, which was Lawlor I believe. He came in one day and had a woman in his car. One of the boys in the Yard was taking care of him. I believe he sold us some zinc on that occasion. I don't recall a child being in the car though there may have been one; that is the occasion which I recalled to Mr. Albrecht as testified by him. At no time do I definitely remember having any dealings with these people. The only recollection I have is from my records (R. 274).

On the average day we spend \$1000 in cash in purchase of metals from others. The firm has advertising seeking to encourage people to bring metal to it for sale (R. 275). During the month of August, 1950 we didn't customarily enquire of the seller where he got the material. We merely asked them to sign a receipt that they had sold it and received the money for it. That is a general practice through the trade. We discovered that our competitors had never made a practice of questioning where things came from. I have enquired of a seller where he got the merchandise and didn't get truthful answers (R. 275).

I know Brown. Brown used to come in on a few occasions. I don't remember how many or if he was alone on each occasion that he sold the scrap metal. I cannot recall of buying any zinc from him (R. 276). I don't remember the incident of when he came in on the 18th of August, 1950. Government's Exhibit "C" is in my handwriting though I don't recall making out the ticket (R. 277). I know what I purchased on that sales slip. It was brass. I know that because that is the way the ticket reads and that is what I put down. I couldn't have been mistaken. We make it a strict ruling of the company to always mark the item you are buying (R. 280). We do that because we maintain an inventory and try to keep a close record of what is coming in. It is my practice to write down the precise item which I buy on the sales slip and the exact amount that is paid out. We tally our box every day and our amount of tickets must correspond with the amount of money spent that day. The conversation testified to by Brown that I asked him where the zinc came from and he told me Pearl Harbor, didn't take place (R. 281). I didn't then say "We will write it down as brass, it will look funny coming in here in slabs". I know I didn't say that because I never bought any zinc from the man named Brown. I have no remembrance of the particular transaction of Brown coming to the Yard at the time this brass was purchased (R. 282). If I had bought zinc from Brown, I would have a receipt to show that I did. I cannot recall of striking out any writing on the Exhibit which you have or the original of it and then writing the word "brass" (R. 283).

There were three of us customarily operating in the Yard in the buying and weighing of metal that we purchased. They were Harry Newman, Adam Jose and myself. Mr. Goodman was not doing any buying at that time and has not done any since the place of business has been located on Sand Island Road (R. 283). According to the tickets 17 purchases were made on the 18th of August, 1950. Of those 17 purchases, Ticket No. A-6780 was the seventh purchase of the day (R. 284).

The first information I had that any zinc in slab form had been stolen from Pearl Harbor was the day Mr. Albrecht came in and notified us. I can't deny that that was the 8th of September, I don't know. Mr. Albrecht made mention that a certain type of zinc was stolen from the Navy, inquired if we had purchased any, wanted to take a look at our records. I believe we turned the records over to him and that is about all I recall of the first instance. I believe I told Mr. Albrecht that we had purchased some zinc. By "we", I meant the company or one of the boys in the Yard (R. 285). I believe that was the time I told him that I bought it from this young fellow who came in in the blue Ford and had a Filipino woman in his car and that it should be at the back end of the Yard. I took Mr. Albrecht back with me to the back end of the Yard. I remember it was on the right hand side in front of the Rag Warehouse where I had last seen it. When I got back there we didn't find it. I asked the foreman, Adam, if he had moved it. He didn't remember moving it or what happened to it

(R. 286). One or two days before Mr. Albrecht came in, we had a theft. Someone came in the back end of our Yard and broke our gate open. We reported it to the police and they were down and investigated it. I don't believe we reported anything stolen. We have too many loose things stored at the back end (R. 286).

In August of 1950 we didn't have any particular procedure for packing for shipment. If we had a shipment to prepare we pulled as many men as we could take off of any particular job to prepare whatever metal we were preparing on that particular shipment. We invariably packed in drums. Some of the metal was compressed into briquettes, such as zinc, copper, aluminum and brass. This is to conserve space in packing (R. 288).

In August of 1950 after metal was weighed it was taken and thrown from the scale to the shearer. Some was thrown off the scale on the right side, some was put in wheelbarrows and put away, some was put on skips and taken out of the way. We were busy and not overstaffed and we did the best we could in keeping our scales clear. Material which we desired to compress into briquettes would be invariably thrown on the skip or wheelbarrows and taken right over to the briquetting machine. Our machine made a briquette about 5 x 5 x 18. The size of briquetting depends upon the compressing power of the machine (R. 289).

All I can recall about the four pieces of zinc that were adjacent to the scale when Albrecht came in, is

that Mr. Albrecht saw them or I pointed them out to him. He went over and looked at them and told me that was the type of material he was looking for. I believe that was when I told him we had some in the back of the Yard (R. 290). I heard the testimony of the witness Lawlor, that on one occasion I told him he didn't need any ticket. That conversation never took place because we made out a ticket for every sale; we must have a ticket to account for the money we give out. I am now under the impression there were two Bobbies. If I remember correctly there was a ticket which I saw marked Bobbie which I believe was Lawlor's Bobbie. I think the other Bobbie is in Oahu Prison (R. 291-2). Until Lawlor appeared in Court I didn't know his name. The one and only time I recall Lawlor selling zinc to the Honolulu Supply Company, that ticket was marked Bobbie (R. 292-3). I think that is ticket number 6766, Government's Exhibit I-4. I also believe ticket number 6833, 315 pounds of copper, etc., signed Bobbie, Government's Exhibit No. I-9 was signed by Lawlor (R. 293).

There is nothing unusual in the type of zinc slabs that I either pointed out to Albrecht or that he found adjacent to the scale. The fact that some of the slabs bore the word "Missouri" imprinted from the mold didn't indicate anything with reference to its newness to me. Invariably all slabs of zinc have some brand name on them (R. 294).

The next time I remember seeing Mr. Albrecht was the day I took him out and opened the drums for

him. I don't remember the date. I explained to him that the only possible place the zinc could be would be in one of the drums; that it was possible that one of our men had gone ahead and drummed this up and capped it and put it away on a pile. I suggested that we go and open up all these drums of zinc. It was the only place I thought it possibly could have been if it was stolen (R. 296). We went back there and I pointed out the row of zinc and then we had a row of what we call Ine (contaminated) zinc. We took down a row of so-called clean zinc and we opened up the drums and let Mr. Albrecht and the other man with him go through them. Then we went to the next drum and so on and so forth. I believe we even opened up some of the drums with contaminated zinc until such time as he was satisfied that what he was looking for was not contained in those drums and what I had mentioned we had, was not contained in those drums (R. 297).

Drums of material which have been sorted and prepared for shipment are handled with material handling equipment and not by hand. The difference in weight would not be apparent when you are handling material by a finger lift (handling equipment). When we handle a palette with a finger lift it is the uniform practice that there are 4 drums to each palette. The drums are marked as to what they contain. We have tried to enforce a rule that the man who makes it, be the only one to mark it but we found it happen otherwise. Two boys might be working together packing drums; maybe half a dozen drums

to pack of one item. They will go ahead and pack all of them and when they are on the last one, one guy will go down and mark all six of them. Occasionally we find a drum to have been mismarked or a drum put away with no markings on it at all (R. 299).

At the time we opened the drums for Mr. Albrecht I showed him where the row of zinc was; all the zinc that I knew of being in the Yard. We took that row down and started opening the drums at random. We offered to open drums anywhere in the Yard out of any stack. I showed Mr. Albrecht our identification marks of different grades of metal and we agreed there was no need of opening up drums of copper or brass (R. 299).

There were many drums sealed and ready for shipment in the lefthand side in the Yard. We tried to pack our metal as fast as possible to get it out of the way because our Yard is small (R. 300).

In August of 1950 I had no proprietary interest in the Honolulu Supply Company; I was working as a salaried employee (R. 301). I never at any time had any intention to convert any Government property which I knew to be stolen, to my own use. I never attempted to conceal any Government property which I knew to be stolen.

(Cross-examination). The ticket numbered 6780 is in my handwriting except the signature. I testified it represented the seventh sale made that day because the serial number is in sequence and goes between 6779 and 81. The reason it is dated June 18th while

the rest are dated August 18th, is that if you check right through this particular day you will notice that I personally made the error, put the sixth month instead of the eighth month, which occurs several times through our records (R. 311).

None of these boys ever appear in front of me in uniform. I know Mr. Brown only as a civilian. I didn't know that he went AWOL (R. 314).

Harry Newman, Adam Jose and I look after the shipments of metal from the Honolulu Supply Company. One might make the entire shipment himself or all three of us might make it or we might have one of the boys in the Yard make it while the other man loads (R. 315).

In August and September of 1950 I was the manager in the absence of Mr. Goodman. I receive a bonus in addition to my salary but I don't know on what that bonus is based. I received a bonus every year I have been with the Honolulu Supply Company. The bonus varied in amounts (R. 316).

I didn't know Lawlor as Bobbie. I know of tickets of sales that Lawlor made to the Honolulu Supply Company where he signed the name Bobbie on the tickets and I have now discovered that there was a fellow who went by the name of Bobbie who is one of the four who allegedly is connected with this theft of zinc (R. 319). The reason for my saying he signed Bobbie was I knew that Lawlor had sold that zinc on one particular date. From our records I see that the ticket was made out by Mr. Newman, one of our employees. The ticket is signed Bobbie, therefore I

assumed and it is my opinion that Mr. Lawlor who sold the zinc on that day signed the ticket Bobbie. Going through our records I notice that Bobbie's name appears quite frequently (R. 320).

I spoke of two men that I recalled signing the name of Bobbie. I came to the conclusion that a man named Enos was one of them. His name is Bobbie Enos (R. 325). I think that two different people signed Bobbie because there is a difference in the signatures (R. 327).

At the time of the theft we didn't exactly report anything stolen which we could definitely say was stolen at the time. We stacked maybe 1000 or 2000 batteries at the back end of our Yard at one time or another. If someone was to take out 100 or 200, you would never spot it (R. 329).

I was present when the zinc was seen (by Mr. Albrecht) by the side of the building. I don't know whether that was the same that was brought here in Court the other day. It appeared to be the same type. I don't recall whether it was the same type of zinc Mr. Lawlor sold. I saw that zinc but zinc slabs are very much alike (R. 330). Zinc comes in all categories and all forms (R. 331).

I don't recall this shipment to the California By-Products Corporation. I don't recall who handled that. In shipping we make up a little piece of paper and hand it to Mr. Goodman and tell him we will ship so many drums of this or that. He takes care of sending out the invoices (R. 331). The man who prepares the shipment doesn't necessarily make up

the paper. I am not familiar with this invoice which is Plaintiff's Exhibit "D" (R. 332). I don't recall any of the circumstances surrounding the making up of that invoice. I have no independent recollection of the Bill of Lading which is Plaintiffs' Exhibit "E" or of the articles shown on this Bill of Lading (R. 333).

I recall the time I opened the drums for Mr. Albrecht. At that time I didn't tell him anything about a shipment of zinc that had gone out from the Honolulu Supply Company. I can't remember that one had gone out (R. 340).

Max Goodman, a witness in his own behalf, testified in substance as follows:

I have been in business for myself ever since I was 21 years old. I have never been arrested or had any difficulty of any kind with the authorities (R. 344). We buy scrap metal from whoever offers to sell it to us. We buy from the dealers on all the other Islands and from the local dealers in Honolulu. We attempt to buy on all Government sales (R. 345). I own the Honolulu Supply Company; no one else has any financial interest in it (R. 346). The Honolulu Supply Company does a volume of business each year from \$750,000 to \$900,000 (R. 346); that represents the amount of sales for the year and would involve anywhere from 1500 to 2000 tons of scrap metal (R. 347).

The first I became aware that there was any investigation concerning some stolen zinc was when Mr. Albrecht came into our office enquiring about zinc

(R. 347). He asked to see records and we always open our records. We furnished all the records he wished. I don't recall any conversation that took place while Albrecht was examining our records (R. 348). Mr. Albrecht came in quite frequently. I have no record of any dates (R. 349). On many occasions Mr. Albrecht asked to look through the Yard and inspect certain of the drums. I don't remember the date but on one of those visits he came in and asked if he could look into the Yard. I took him through the Yard and showed him stacks of copper and brass and stacks of zinc and other materials, and I offered to open any or all drums that he wanted to see. Those drums are stacked 4-55 gallon drums to a skip and we use a finger lift to handle it. A skip is a platform which has room to accommodate four steel containers. It is a cargo palette especially made to be handled by a finger lift (R. 351). Those palettes are stacked three high so that in each stack there are 12 drums (R. 352). We opened up the drums and dumped it out and kept doing that until Mr. Albrecht said "I don't believe there is any need of going further." We spent about an hour or an hour and a half (R. 352).

Mr. Cottler called me on some matters and among other things told me that they had found some zinc in a previous shipment that came in with other materials and I told him over the telephone that I didn't recall selling or shipping any zinc to him and there wasn't supposed to be any zinc there. I told him if he did find any zinc to hold it to one side. He didn't describe the zinc to me as far as I can remember.

During that time we were buying and selling zinc. We were getting zinc from other Islands. We had several shipments of zinc that came in here from Guam and we were buying from whoever offered to sell it to us (R. 352-3). On September 25, 1950 we bought three different grades of zinc from the Industrial Corporation. I have no present recollection of what disposition was made of that zinc (R. 354).

At the time I talked to Mr. Cottler on the telephone it didn't occur to me that the zinc which had been located in the shipment at Los Angeles could have been a part of the zinc which allegedly had been stolen. I was very busy with many other things at the time (R. 356). I talked to Mr. Albrecht several times after that but I don't recall of informing him that some zinc had been located in the shipment at Los Angeles. The first indication I had that the zinc at Los Angeles was of the type that Albrecht was looking for was when Cottler wrote me a letter mentioning that the agents were in there to look for some zinc and that they found zinc in the premises and the agents thought that was the zinc that was missing from Pearl Harbor. In return I wrote him that if the agents wanted the zinc he should give it to them and get a receipt for it. I wanted a receipt because there was a chance we could get the material back (R. 357).

In August of 1950 I had between 25 and 30 regular employees. I have arrangements with an individual who goes throughout the territory gathering up scrap metal for me. He is on a salary (R. 359-360).

When material comes into our Yard it is weighed in and examined and we take it to certain areas of the Yard. If it is copper wire we take it to a baler briquetting machine which prepares it and makes it into briquettes and packs it in steel drums. When the drum is fully packed we put a top over it and seal it and stack it in an area where we stack copper ready for shipment. Sometimes the drums are marked; sometimes unmarked (R. 360-1). If it is scrap aluminum we briquette it and pack it in steel drums. If it is some other type of aluminum we pack it loose in drums. As to lead, some of it we pack in steel drums, some we melt down (R. 361). When melted, we put it into ingot or slab form. I have a crew which is occupied with drumming material. Ever so often they make mistakes; they are unskilled men (R. 362). We have anywhere from 400 to 800 drums at a time ready for shipment.

I never saw the people who have testified here under the name of Brown and Lawlor and I never had any dealings with either of them. I don't know a man named Blanton (R. 363).

I observed a couple of slabs of alleged zinc here in the Court Room the other day. I have seen slabs like that in my Yard at the time when Mr. Albrecht came in inquiring and looking for zinc. I saw two slabs and two plates (R. 363). I have seen slabs or plates similar to that in my Yard but I don't recall when or exactly the quantity. I don't recall seeing that particular brand name "Missouri"; I might

have (R. 364). I don't recall what disposition was made of the zinc slabs that I saw in my Yard. I never ordered it shipped; I never at any time concealed or attempted to conceal it with intent to convert it to my own use (R. 364).

(Cross-examination). I don't personally do any of the buying of materials and I don't believe I handled the purchase of any material in August and September of 1950 (R. 350).

I believe that Government's Exhibit "D", an invoice, and Government's Exhibit "F", a credit memorandum, received from the California By-Products Corporation represent the same shipment (R. 369). I didn't know that was the shipment Mr. Cottler telephoned me about. I explained the fact that Mr. Cottler said he received zinc in a shipment labelled aluminum, as follows: The drums could have been marked by mistake, aluminum, instead of being zinc. We have zinc on our premises at all times (R. 370). That zinc was shipped out by mistake. My employees have made mistakes involving a similar quantity of metal. It would take about 2 or 3 drums to hold 3305 pounds of zinc in slabs (R. 371). Later Mr. Cottler wrote that the F.B.I. had been to his place enquiring about zinc (R. 372). I may have told Mr. Albrecht that I hadn't shipped any zinc between October 31st and September 8th, 1950. I hadn't checked my records before I told him that. I thought we hadn't shipped any zinc for quite a little while. We only ship when we have a large accumulation (R. 374).

I don't recall just when it was that we made a mistake involving 3300 pounds of metal in mislabelling the metal but that has happened quite frequently. We try to be as careful as possible, so I wasn't surprised when Mr. Cottler called and told me that shipment contained zinc. I didn't know it contained zinc and I was surprised when Mr. Cottler called me and said the F.B.I. had been there (R. 377).

Mr. Swartz is more or less of a manager at my place and in addition to a salary I pay him a bonus. I give all my boys generous bonuses. If I made more money one year than another, I would be inclined to give him a larger bonus (R. 378). Plaintiffs' Exhibit "H", a letter signed by myself to the California By-Products Corporation, I remember. I don't recall what letter was referred to in the paragraph which says "We think we have also returned by mistake your last letter." I don't recall if I ever got that last letter back or a copy. Those words don't mean anything to me now (R. 379).

Harry Newman testified for the defendants in substance as follows:

I am a scrap buyer for the Honolulu Supply Company and have worked for the company about four and a half years. I am one of the employees authorized to make purchases from customers who came to the yard to sell material (R. 385). I don't know a scrap metal dealer named Blanton. I may know a Brown who brought scrap metal to me to sell in August of 1950. I don't recall him by name; I don't recall a man named Lawlor (R. 386).

In Government's Exhibit I, the following tickets are in my handwriting: 6704, 6766, 6770, 6809, 6811 and 6876. Some of those tickets were signed with the name Bobbie. I have no present recollection of who Bobbie was or whether there was more than one person who signed the name Bobbie (R. 386). As to the ticket dated August 17, 1950, A-6766, I don't recall the circumstances of that sale. I don't recall what the man looked like who signed Bobbie on it. I have no present recollection of the transactions represented by ticket A-6711. It was for the purchase of 532 pounds of zinc and it ran about 6¢ a pound (R. 387). During that period of time, 6¢ would be a close figure my firm was paying for zinc and 10¢ or better a pound for brass (R. 387).

Referring to ticket A-6744, it recites 580 pounds of brass carried out at \$58. If that had been zinc we were purchasing, the price payable would not have been over 6¢ (R. 388).

During August of 1950 I don't recall seeing any zinc slabs marked "Missouri". If there had been such slabs in the yard, it would not have struck me as being unusual (R. 389).

(Cross-examination). I am sure that our metal sorters have made mistakes in sorting metal (R. 392).

Adam Jose, a witness for the defendants, testified in substance as follows:

I am the yard foreman employed by the Honolulu Supply Company. I have about nine men working under me. They do all sorts of work. Weaver Russell

and Sonny Valentino are under my supervision and they usually handle most of the metal (R. 399). When we are making a shipment to go to the piers, if we only have a few days' notice we get everybody in the yard to pitch in. Usually the men putting the metal in the drums put their mark on it but lots of times they don't. Lots of times the tops are put on the drums before it is marked and lots of times we have to reopen it. Lots of times the ones that put it in just glance in there and they figure they know what it is and they put a mark on it (R. 401). We generally stack the drums in the yard in rows for each kind of metal. We have about eight rows and we usually have a mixed row (R. 402).

We have an employee named Gregorio who probably can read a little but he can't write. There are lots of times when drums are to be marked, we show him just what type of marking we want on the drums and he will follow whatever we give him (R. 403).

I have seen some zinc around the yard similar to those which are shown in Government's Exhibit "B". I don't remember when. I didn't pack any of that type of zinc. I saw about 15 slabs around the scale; it was loose (R. 404). I saw that lot of zinc on a palette about halfway back in the yard; I think I put it there (R. 405).

(Cross-examination). The sorters do most of the putting of the metal into the drums. When there is a rush we have the whole crew doing it (R. 408). There are a lot of times when metal sorters are through sorting their metal and we have another boy

who comes in to put the capping before they are marked and there have been cases where we reopened the drums to see what is in it, and there are a lot of cases where for instance, Weaver would just look in a hole and figure it was yellow brass and he would mark it yellow brass (R. 410). I saw about 15 slabs of zinc out there on a palette. Mr. Swartz brought Mr. Albrecht back there and I showed him where I dropped the skip. It was just about the time when someone broke in (R. 411). I don't know where those 15 slabs went (R. 412). The amount of 3300 pounds of metal or 2 drums of metal does not impress me as a lot of metal (R. 414).

Horace T. Horiuchi, called as a witness for defendants, testified in substance as follows:

I have been engaged in the buying and selling of scrap metal (R. 427). I am a competitor of Mr. Max Goodman who I have known about seven years. I have seen slabs of zinc that contained the word "Missouri" imprinted on them only one time. That word "Missouri" on the slabs of zinc does not indicate anything to me (R. 436). I saw them when my brother purchased that zinc (R. 437).

(We omit the testimony of the many witnesses who testified to the good reputations of the appellants.)

At the conclusion of all the evidence in the case each appellant moved the Court for a judgment of acquittal (R. 468). The Court took the motions under advisement (R. 468), the motions were subsequently

reduced to writing (R. 18). The Court denied the motions after the jury returned the verdicts of guilty (R. 489).

SPECIFICATION OF ERRORS RELIED UPON.

Specification of Error No. 1.

The trial Court erred in denying the motion of appellant Arnold Swartz for a judgment of acquittal made at the conclusion of all the evidence in the case (R. 468, 489).

Specification of Error No. 2.

The trial Court erred in denying the motion of appellant Max Goodman for a judgment of acquittal made at the conclusion of all the evidence in the case (R. 468, 489).

ARGUMENT.

I. THE STATUTE INVOLVED AND THE PARTICULAR OFFENSE APPELLANTS WERE CHARGED WITH HAVING COMMITTED.

The indictment is based on Section 641 of Title 18 U.S.C. This statute reads as follows:

“Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or things of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

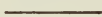
Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The word ‘value’ means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.’

The indictment (R. 3-4) charges that the defendants between the months of September and December, 1950, “did knowingly, wilfully, unlawfully and feloniously *conceal with intent to convert to their own use and gain*, things of value of the United States, to-wit, 59 zinc ingots” etc.

The statute defines several distinct and separate crimes, to-wit: Embezzlement, larceny and conversion of government property; selling, conveying or disposal of money or property of the United States without authority, etc. (Cf. *United States v. Carpenter* (7 Cir.), 143 F. (2d) 47; *Lewis v. Hudspeth* (10 Cir.), 103 F. (2d) 23). Appellants were not on trial for any of the foregoing crimes; they were tried and indicted only for a violation of the second paragraph of the statute, viz.: concealing with intent to convert to their own use and gain 59 zinc ingots the property of the United States, knowing the same to have been stolen.

The portion of the statute under which appellants were tried provides that an act committed in violation thereof must consist of the following elements, each of which the United States had the burden of proving to that degree of certainty required by law: (a) that the zinc ingots were the property of the United States, (b) that the same were stolen from the United States, (c) that appellants concealed the ingots (d) with intent to convert the same to their own use and gain (e) knowing the same to have been embezzled or stolen. Each of these elements of the offense the government had to establish beyond a reasonable doubt. As hereafter demonstrated the government failed to carry this burden of proof.



II. ESSENTIAL FACTS NOT ESTABLISHED BY THE EVIDENCE THE EXISTENCE OF WHICH WERE LEFT TO THE SURMISE AND CONJECTURE OF THE JURY.

It was the theory of the government on which the case was tried that in August of 1950 Brown and Lawlor stole certain zinc ingots from the Pearl Harbor Navy Yard, that they sold some of this zinc to the Honolulu Supply Company (owned by appellant Goodman), that appellants knew the zinc was so stolen and in order to conceal and convert the same appellants shipped this zinc to the California By-Products Company in California.

The record establishes that each of the following facts essential to the establishment of the charge, were never proven by any competent evidence, but

were left to the surmise and conjecture of the jury and that such facts could only have been found by the jury piling inference upon inference:

(1) That the zinc found at the California By-Products Company was the same zinc that had been stolen from the government;

(2) That the zinc found at the California By-Products Company bore the imprint "Missouri", as did all the zinc at the Pearl Harbor Navy Yard;

(3) Whether the zinc in the shipment of the 28 drums of metal to the California By-Products Company was contained in separate drums or scattered throughout the 28 drums;

(4) What, if any, markings were on the 28 drums so shipped identifying the contents;

(5) Who selected the drums that were shipped to the California By-Products Company;

(6) Who packed the drums so shipped to the California By-Products Company;

(7) That either Swartz or Goodman knew, at the time of shipment, that any zinc was contained in the 28 drums so shipped, or that they selected any or all of the drums to be shipped;

(8) That either Swartz or Goodman knew that any of the contents of the 28 drums was property that had been stolen from the United States.

In amplification of the foregoing, *the United States had it within its power to produce and failed to produce the following evidence and witnesses:*

(a) The federal agents who located and saw the zinc at the yard of the California By-Products Company;

(b) Any or all of the zinc found at the California By-Products Company;

(c) The employee of the California By-Products Company who unpacked the 28 drums and found the zinc;

(d) The drums or containers in which the zinc was found.

III. THERE WAS NO SUBSTANTIAL EVIDENCE TO ESTABLISH THE GUILT OF THE APPELLANT ARNOLD SWARTZ.

Specification of Error No. 1.

The evidence establishes without conflict that the appellant Swartz was only an employee of the Honolulu Supply Company owned by the appellant Goodman. This was the testimony of both Swartz and Goodman and was also the subject of a stipulation entered into between the government and the appellants (R. 265). A resume of the evidence pertaining to the appellant Swartz discloses only the following:

The thief Elden Brown testified that after stealing the zinc at Pearl Harbor, he sold some of it to the Honolulu Supply Company; that the first sale was made on August 18, 1950; that he sold it to Swartz; that Swartz made out a blue ticket. When shown Government's Exhibit "C", Brown said that he thought that was the ticket he received and that Swartz had scratched out the word "zinc" and writ-

ten in the word "brass" (R. 81, 82); that each time he went to the Honolulu Supply Company he was in civilian clothes (R. 93); that he dealt twice with Swartz on the morning of the 18th; that on his first visit in reply to a query he told Swartz he had got the zinc at Pearl Harbor (R. 96); that in the instance of both sales he threw the ticket away (R. 97). The record shows the ticket Brown received calls for brass and the payment of \$34.80. Brown testified he received 6¢ a pound for the zinc and that for the two lots he received close to \$100 (R. 101); that on August 16th or 17th he accompanied Bobbie and some others, at which time brass and copper were sold to the Honolulu Supply Company (R. 102); that prior to these occurrences he had stolen copper and brass from Fort Barrett and told Mr. Albrecht they had received \$108 for this material as evidenced by the blue ticket numbered A-6744 which shows 580 pounds of brass at \$58.00; that a man named Blanton carried out this last transaction and Brown didn't know with whom Blanton made the deal (R. 152-3); that he only sold stuff to the Honolulu Supply Company on two occasions (R. 156); that the copper and brass he stole at Fort Barrett was sold to the Honolulu Supply Company (R. 156).

The thief Vincent Lawlor testified that he went to the Honolulu Supply Company three times, once by himself, once with Brown and once with Blanton and Brown; that he never had any conversation with Swartz concerning these things (R. 163); that when asked where he got the zinc he said "out at a dump

some place"; that was all that was said about it (R. 164-5); that the time he went down with Brown he dealt with Mr. Goodman and nothing was said about where the zinc came from; that Goodman paid Walter Blanton the money (R. 166); that when he went there alone his wife and little boy were with him (R. 168). A few days before that he went there with Brown (R. 169); that Brown went in and talked to somebody and then Swartz came out and looked it over; that Blanton wasn't present when the actual sale was made (R. 171); that on other occasions he had some copper wire and some lead coating and brass which they took and sold to the Honolulu Supply Company (R. 180); that at the time he went with Brown, Brown came out of the office and divided what he got with him; that Brown told him he had probably received \$34.80 (R. 184).

F.B.I. Agent Albrecht testified that on September 8, 1950 he went to the Honolulu Supply Company and saw Swartz and Goodman (R. 201) and advised them of the theft of zinc from the Pearl Harbor Navy Yard (R. 201-2); that he looked out the door and saw two ingots of zinc lying on the ground. Swartz said he recalled purchasing it and gave him the approximate date; he described the seller as a person who had come in a blue Ford coupe and had his wife with him (R. 203); that the two pieces of metal had the word "Missouri" stamped on them (R. 204); that in January of 1952 he went to the Honolulu Supply Company and first talked to Mr. Swartz; that Swartz tried to locate the files and could

not; that Swartz located the '49 and '51 file but couldn't locate the 1950 file (R. 230); that on October 31st Goodman and Swartz took him out and opened about 10 drums and they looked into them and there was no zinc in the shape in which the original ingots were (R. 216).

If we stop here in the testimony, it is apparent that there was no evidence introduced by the government establishing the charge that the appellant Swartz concealed this stolen zinc or that he concealed it with intent to convert the same to his own use and gain.

All of the evidence in the case relative to the shipment of the zinc to the California By-Products Corporation in California, of the correspondence between Mr. Cottler and Goodman relative to the finding of the zinc in the shipment of the 28 drums, all conversations between Albrecht and Goodman relative to the zinc that was found in California, makes no mention whatsoever of the appellant Swartz.

There is no particle of evidence in the record that Swartz had anything to do with the shipment to the California By-Products Corporation, or that he had any knowledge that any zinc was in that shipment, or that Goodman had advised Cottler to hold the zinc for further action. In fact, the only evidence in the record as to any activities on the part of Swartz at all, is the testimony of the thief Brown, that on two occasions on August 18th he sold zinc which he had stolen to Swartz, an employee of the Honolulu Supply Company. It must be remembered that Swartz was not on trial for buying or receiving stolen government

property. However, Swartz denied that on the 18th he had purchased any zinc from Brown. He testifies positively that on the 18th the purchase made by him was brass; that he had no particular remembrance of the incident but that Government's Exhibit "C", which was identified by Brown as the sales tag of his first sale, shows that he purchased brass (R. 277, 280). That the transaction involved brass is made manifest by the record. The evidence shows that during that period of time the purchase price of zinc was 6¢ a pound and that the purchase price of brass was 10¢ a pound (R. 387). The ticket positively identifies brass as the subject of the sale (R. 90). The fact that the ticket bears the date 6/18/50 can lend no support to the government's case. Swartz testified that during that time he had made several mistakes by writing "6" instead of "8" for the month of the transaction and Mr. Albrecht testified that when shown the blue slips or tickets that they were all in numerical order and apparently in chronological order (R. 234).

So far as the Lawlor transaction is concerned, Swartz testified that he saw Lawlor come into the yard; that there was a woman in his car; that one of the boys in the yard took care of him and that he believed Lawlor sold some zinc on that occasion (R. 274).

We emphasize that there is no evidence to show that the appellant Swartz did anything to conceal any of the government's zinc, if any was sold to the Honolulu Supply Company. There is not one

piece of testimony showing that Swartz had anything to do with the packing or shipment of this zinc or had anything to do with any of the dealings with the California By-Products Corporation or with any correspondence relative to the shipment of the 28 drums or the finding of any zinc in such shipment.

We further emphasize the fact that there was no proof before the jury that any of the zinc found in the shipment to the California By-Products Corporation was zinc that had been stolen from the United States or was the zinc that had been sold to the Honolulu Supply Company by either Brown or Lawlor. This point we will argue more fully under the next heading. However, there is no evidence to connect Swartz with such shipment or such zinc.

In order for the jury to have found Swartz guilty, it was necessary that they build inference upon inference and presumption upon presumption. This cannot be done (*Brady v. United States*, 24 Fed. (2d) 399, 403; *Gargotta v. United States*, 77 Fed. (2d) 977). As the case was tried before the jury the jurors in order to support the verdict of guilty against Swartz, had to assume or infer the following facts: that Swartz participated in the shipment to the California By-Products Company; that in that shipment was concealed certain zinc that had been stolen from the government; that Swartz knew that the zinc was stolen government property and that he participated in the shipment for the purpose of concealing it from the government; that by so doing he intended to convert the same to his own gain and use. Each of

the foregoing facts is a mere inference, one based upon the other.

We submit that the evidence was wholly insufficient to establish the charge against the appellant Swartz.

Even the trial judge was extremely doubtful as to the sufficiency of the evidence but permitted his doubt to be removed by the finding of the jury. Thus, in passing on the motion for a judgment of acquittal the record discloses the following:

“The Court. Well, such doubts as I might have personally had on this subject, and as you all know it is a bothersome problem, have been resolved by the twelve men who under the law were to decide from the evidence the facts of this case. I am satisfied that they could reasonably have found as they did from the evidence presented to them, and this does not involve any inferences upon inferences.

Accordingly, again I am going to deny the motion and the verdict stands.” (R. 490).

In addition to the foregoing, we submit that under the rules of statutory construction, the appellant Swartz could not have legally been found guilty under the evidence. We have set forth above the statute upon which the indictment was based (18 U.S.C. Sec. 641). It will be noted that the first paragraph of this section dealing with the embezzlement, stealing, purloining and conversion of government property, uses the following words: “or knowingly converts to his use *or the use of another*”. The second paragraph of the section under which the indictment was brought

merely provides that one who receives, conceals or retains the same "with intent to convert *to his use or gain*, is guilty". The indictment merely charges the concealment of the ingots with intent to convert it to the use or gain of the defendants.

The presumption is that the Congress knew what it was doing when it enacted these two sections and that by omitting the words "or the use of another" from the second paragraph and permitting such words to stand in the first paragraph, the Congress intended a different meaning to apply to the second paragraph than is expressed in the first paragraph. It is entirely probable that the omission of such words in the second paragraph was to cover such a situation as is presented in the case at bar, that is, that the mere employee of one who conceals stolen Government property with the intent to convert it to his own use or gain, is not guilty, either as a co-conspirator or as a principal with such employer.

Not only is there no evidence in the record that the appellant Swartz concealed any of this zinc but there is no evidence in the record that Swartz was to gain either the use of such zinc or to profit by such concealment. The trial judge was greatly perturbed over this point (R. 462-3) but held that because Mr. Goodman had testified to the giving of his employees bonuses which varied according to the amount of business done each year, that this was some indirect proof that Swartz could gain by the concealment of the zinc. This is not a logical inference that can be drawn from the testimony. If the

zinc could never be sold, under the foregoing reasoning the bonus would be less or, if the market price dropped, the yearly bonus would be less. According to the indictment there is but 3311 pounds of zinc involved. The evidence showed that the price paid for this zinc was 6¢ per pound. The evidence establishes that the selling price of this zinc on the open market was but 8¢ per pound (R. 195). Thus, to follow out the trial Court's inference, the yearly profits of the Honolulu Supply Company would have been increased by the sum of \$66.22, or an increase in Swartz's bonus of approximately \$1.00 a year, seeing that these bonuses were spread over the entire number of employees of the Honolulu Supply Company. The facts do not justify the inference that the trial judge held could be drawn by the jury.

Neither does the aider and abettor statute justify the conviction of appellant Swartz. To hold that one who assists another in so concealing Government stolen goods is guilty as a principal would do violence to the Congressional intent, as evidenced by the omission of the words "or the use of another" from the second paragraph of the section. The intent of Congress is clear that under the second paragraph no one could be guilty unless the act was done in order that the property be converted to the use or gain of the particular individual on trial.

The guilt of the appellant Swartz could only have been brought about by the jury indulging in suspicions, which cannot be done (*U. S. v. O'Brien*, 174 Fed. (2d) 341, 345) or by the indulging in inferences not justified by the proven facts and by the

piling of one such inference upon another. As our Supreme Court said in *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 344, 77 L. ed. 819, 825:

“Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible.”

IV. THERE WAS NO SUBSTANTIAL EVIDENCE TO ESTABLISH THE GUILT OF THE APPELLANT MAX GOODMAN.

Specification of Error No. 2.

Before discussing the evidence relative to appellant Goodman, we call attention to the uncontradicted testimony relative to the manner in which metal was handled in this appellant's Yard. These facts are equally applicable to and should be considered in determining the sufficiency of the evidence as against the appellant Swartz.

Max Goodman was the sole proprietor of the Honolulu Supply Company. His yearly handling of all kinds of metal ran between 1500 and 2000 tons (R. 347). Thus, 3000 pounds of zinc constituted a very minute portion of the yearly handling. In the making of shipments, Newman, Jose and Swartz looked after the same or the shipments were handled by one of the other boys in the yard (R. 315). If the shipment was large, as many men in the Yard were called upon to do the job as needed (R. 288). During the periods of time in question, Goodman was

employing 25 to 30 men (R. 359-360). After metal was assorted and put into drums, the drums were capped. At times markings were placed upon the drums indicating their contents at the time they were capped. At other times one or the other employee would peek into the capped drum, either through a hole or glance at the top of the uncapped drum and guess or surmise what the full contents of the drum were and then mark it (R. 401). There was also an illiterate man in the Yard who would be told the kind of marking to put on a drum and he would mark the drum (R. 403). There were occasions when drums were mismarked (R. 299) and on more than one occasion mistakes occurred either in the packing of the drum or in marking the same or in making shipments of metal (R. 371, 392).

The only testimony in the record relative to Mr. Goodman indulging in any purchases of zinc was that given by the witness Lawlor who testifies that on one occasion he went to the Honolulu Supply Company with Brown and dealt with Mr. Goodman; that there was nothing said then about the zinc; that Goodman did not ask where the witness had got it and that Goodman paid Blanton the money (R. 166). Max Goodman denied having any dealings with either Brown or Lawlor (R. 363). Mr. Goodman testified that during the periods in question he was buying and selling zinc; that he was getting zinc from the other Islands; that several shipments of zinc had come in from Guam; that in September he bought three different grades of zinc from the Industrial Corporation.

The evidence in the case dealing with Mr. Goodman is found in the testimony of Mr. Cottler of the California By-Products Corporation and in that of the F.B.I. Agent Albrecht.

Mack Cottler of the California By-Products Corporation testified that he had many dealings with the Honolulu Supply Company (R. 115). He produced an invoice from the Honolulu Supply Company showing the shipment of 28 drums under date of September 22, 1950 (R. 116); that a few days later he received a bill of lading for this shipment (R. 117); that he never saw the contents of the shipment until after it was sorted in his warehouse at which time his attention was called to the fact that in sorting the aluminum there had been found 3305 pounds of zinc, the contents of approximately two drums; that he never saw the zinc until after it was sorted; that a few days afterwards he mentioned to Mr. Goodman that in sorting the aluminum they had found some zinc in the material and Goodman said that if they had found anything that didn't belong in the aluminum, to just hold it (R. 118). The witness then produced a duplicate of the final payment sheet which disclosed that his company paid for the aluminum and that it held, subject to what Mr. Goodman had told him, the zinc and the brass that was included in the shipment (R. 119).

The witness then identified two letters, Plaintiffs' Exhibits "G" and "H", being cross-correspondence between the Honolulu Supply Company and the California By-Products Corporation (R. 131, 132). The witness stated he couldn't tell what the markings

were on the drums his company received (R. 139); that at no time did Mr. Goodman tell him to dispose of this metal. Plaintiffs' Exhibit "H", letter dated January 18, 1951 from the Honolulu Supply Company reads as follows:

"With ref. to our letter dated Jan. 9th, in which we sent back your returns for checking purposes, we think we have also returned by mistake your last letter. In that case, please send it back to us or if not, send us a copy.

With reference to the two drums of Zinc, you mentioned in your letter that the government authorities had been in your premises and made an inspection of the material following which they asked you to hold it for further instructions.

You will therefore let the authorities take this metal from you but, please, be sure to obtain a receipt for same."

Cottler further testified that on many occasions the Honolulu Supply Company had shipped metal to the California By-Products Corporation without its being ordered (R. 137).

Harry Albrecht, the F.B.I. Agent, testified that he went to the Honolulu Supply Company on September 8, 1950 and advised Swartz and Goodman that there had been a theft of zinc from Pearl Harbor; that they said they couldn't recall buying any zinc recently; that Albrecht asked to look through their records, which right was accorded him and he made certain notations from the blue slips (R. 202); that he saw two ingots of zinc lying on the ground (these ingots were never introduced in evidence); that he

said they appeared to be the same as the ones he was looking for and asked if they had any quantity of them; that Goodman couldn't recall having purchased any himself but Swartz told him he recalled purchasing it once and gave the approximate date and described the seller as a person who had come in a blue Ford coupe and had his wife with him (R. 203). (Swartz testified that when he said he recalled this one instance of buying such zinc, that he meant the company had bought it and that he hadn't made the purchase). Goodman told Albrecht that he didn't know where the zinc was in the Yard; that they had hundreds of drums of various kinds of metal and he didn't know where it was located at that time (R. 205); that Albrecht looked over the files of blue tickets; that they were filed in numerical sequence and the dates generally following the dates in numerical sequence (R. 207); that Government's Exhibit "C", the ticket containing the signature of E. L. Brown, was filed in sequence of other tickets, although the date was out of sequence (R. 207); that on October 31st Swartz and Goodman caused ten drums to be opened for Mr. Albrecht but there was no zinc in these drums similar to that at Pearl Harbor (R. 216). On January 19, 1951 Mr. Goodman gave Albrecht his file for 1951 which contained two letters which Goodman said pertained to the zinc (R. 218). When I first saw Mr. Goodman I asked if I could look for the stolen zinc in his Yard. He said he didn't know where it was but after checking his records and finding he hadn't sold any zinc after the 7th of August, he presumed the zinc was in his Yard.

On August 31, 1950 Goodman said I could have the zinc and we went out to the Yard to look for it (R. 236).

Max Goodman testified that the first indication he had that the zinc at Los Angeles was of the type that Albrecht was looking for, was when Cottler wrote him a letter mentioning that the Agents in examining his premises thought that was the zinc that was missing from Pearl Harbor and in reply to that he wrote the California By-Products Corporation to turn it over to the Agents if they wanted it but to get a receipt for it (R. 357); that he never ordered the zinc shipped to California (R. 364); that the zinc shipped to California was shipped by mistake (R. 371).

An examination of the record discloses that there is no evidence in the case that at any time prior to September 8, 1950 did Goodman know that any zinc had been stolen from the Pearl Harbor Navy Yard. The record further discloses that there was no evidence to show how or in what manner the zinc got into the shipment of the 28 drums to California, or who packed these drums, or who selected the same for shipment, or what markings were upon the drums, or who ordered the shipment.

There is no evidence in the record that the zinc found in California bore the imprinted word "Missouri" or that it was in whole or in part, the zinc that had been stolen from the Pearl Harbor Navy Yard. Just what kind of zinc it was or where it had come from is left in the realm of surmise and conjecture.

There is a presumption that, where a party has it within his power to produce material evidence and does not do so, or produces weaker evidence when more explicit and satisfactory evidence can be produced, that the production of such material, satisfactory or more explicit evidence would have been detrimental to such party. (*Interstate Circuit v. United States*, 306 U.S. 208, 226; 83 L. ed. 610, 620; *Hann v. Venetian Blind Co.*, 111 F. (2d) 455.)

Here, not only did the Government fail to produce any of the zinc found in California, but it also failed to call any witness who could definitely describe such zinc.

The failure of the government to produce the California zinc caused grave doubts to arise in the mind of the trial judge, as is evidenced by the record.

“The Court. The thing that has been bothering me about it was the fact that there was no zinc in evidence here.

Mr. Cobb. That is right.

The Court. But similarly, if someone concealed a tractor or a battleship you couldn't bring it into court, and they don't bring the corpse into court in a murder case, but you do bring a witness who testifies to his own knowledge of seeing the tractor or the ship or the corpse.

So, too, with regard to, for example, flour that may have been stolen and transformed into bread. You can't bring the flour into court. Here the evidence is that which, if the jury saw fit to believe it, that the zinc slabs were stolen from Pearl Harbor by Brown and Lawlor and that they were sold to the Honolulu Supply Company through Swartz, and that zinc slabs during the

period of time when the defense say there was no shipments of zinc were in fact shipped to the California By-Products Company in September and they turned up there, all of which by circumstantial evidence might enable the jury to believe that the slabs that turned up there were those slabs which the boys, Brown and Lawlor, sold to Honolulu Supply Company" (R. 460).

Manifestly the reasoning of the trial judge was erroneous. Where physical evidence cannot be produced in Court its absence is accounted for and supplied by a witness who testifies to the exact description of such property and thus definitely identifies it for the jury. Here the government produced no such witness. The fact that some kind of zinc was found in California after zinc was stolen in Honolulu and sold there does not prove that the zinc found in California was the same as that stolen in Honolulu. Because one fact followed another is no proof that the latter fact had any relation to the former. It is a mere guess that the California zinc was the same as the zinc stolen in Honolulu.

Whatever happened to the zinc that was sold to the Honolulu Supply Company by Brown and Lawlor, if any was so sold, remains unanswered in the record. The Honolulu Supply Company was constantly dealing in the purchase and sale of all kinds of non-ferrous metals. Just a few days before Mr. Albrecht's call at the Yard, the place had been broken into and such fact reported to the police.

Approximately 3300 pounds of zinc was found in the California shipment. The evidence establishes

that whatever zinc was purchased, that 6¢ a pound was paid for the same.

The thief Lawlor testifies that the one sale he personally made to the Honolulu Supply Company netted him about \$35 and involved a little better than 500 pounds of zinc (R. 165-6).

The thief Brown testified that he made two sales of zinc to the Honolulu Supply Company; that for the first sale he received the sum of \$34.80 and Lawlor corroborates the amount (R. 184); that for the two lots he received close to \$100 (R. 101) or at 6¢ a pound he sold something less than 1700 pounds of zinc. Add to this the 500 pounds sold by Lawlor and we only have a total of proven sales of 2200 pounds. Yet the shipment to California contained over 3300 pounds of zinc.

It cannot be argued that because the Honolulu Supply Company shipped 3300 pounds of zinc to California, that this zinc was part of that stolen from the Pearl Harbor Navy Yard. As stated above, there is no evidence either describing or identifying the zinc found in California. There is no evidence that Goodman knew of this shipment or that zinc was contained therein if he did know of the shipment to California. There is ample evidence to show that mistakes had occurred on other occasions and it must be remembered that included in this shipment was certain brass that had not been ordered by the California By-Products Corporation.

It is in the realm of speculation, surmise and conjecture that Goodman ordered the zinc shipped to

California. Goodman never denied that the zinc might be in his Yard. In fact, he told Albrecht that if they had purchased the zinc, it would still be in his Yard and it was upon this assumption that the ten drums were opened for Albrecht's inspection.

We submit that the evidence was wholly insufficient to establish that appellant Goodman concealed any of this zinc for the purpose of converting it to his own use and gain. As pointed out in the argument as to the insufficiency of the evidence to support the charge against Swartz, conversion of this zinc could have resulted only in a profit of less than \$100, an infinitesimal amount when compared to the yearly volume of business done by the Honolulu Supply Company of close to a million dollars a year.

Dated, San Francisco, California,
June 10, 1953.

Respectfully submitted,

LEO R. FRIEDMAN,

Attorney for Appellants.